No. 96-1628

(6)

Supreme Court, U. S.
F I L E D
JUN 11 1997

IN THE

Supreme Court of the United States

October Term, 1996

THE STATE OF NEW YORK; THE BOARD OF REGENTS OF THE STATE OF NEW YORK; CARL T. HAYDEN, LOUISE P. MATTEONI; JORGE L. BATISTA; EDWARD J. MEYER; R. CARLOS CARBALLADA; ADELAIDE L. SANFORD; DIANE O'NEILL McGIVERN, SAUL B COHEN; JAMES C. DAWSON; ROBERT M. BENNET; ROBERT M. JOHNSON; PETER M. PREYOR; ANTHONY S. BOTTAR; MERRYL H. TISCH; HAROLD O. LEVY; and ENA L. FARLEY, in their official capacities as members of the State Board of Regents; DEPARTMENT OF EDUCATION OF THE STATE OF NEW YORK; RICHARD P. MILLS, as Commissioner of Education of the State of New York; URBAN DEVELOPMENT CORPORATION OF THE STATE OF NEW YORK; and CHARLES GARGANO as Director of the Urban Development Corporation,

Petitioners,

v.

YONKERS BOARD OF EDUCATION; YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; REGINA RYER, a minor by her mother, and next friend, CHARLOTTE RYER, on behalf of themselves, and all individuals similarly situated and the CITY OF YONKERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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POINT I

THE SECOND CIRCUIT'S IMPOSITION OF LIABILITY AGAINST STATE OFFICIALS FOR NOT UNDOING THE *DE JURE* SEGREGATION CREATED BY LOCAL OFFICIALS WARRANTS REVIEW BY THIS COURT

The briefs filed by respondents NAACP, the Yonkers Board and the City of Yonkers in opposition to the petition for a writ of certiorari rely heavily on the Second Circuit's statements to the effect that the State affirmatively "encouraged" segregation in Yonkers. Yet they do not and cannot demonstrate that this conclusion is supported by the record or consistent with the factual findings of the district court adopted by the Second Circuit. Thus, the reliance is misplaced.

Respondents seize upon the language of the Second Circuit which describes the district court as having found that the State acted so as to encourage the perpetuation of segregation (12a, 41a). However, the district court never concluded that the State had encouraged the segregation in Yonkers. In fact, it concluded just the opposite. The district court found that "[t]here is no evidence that State education officials ever undertook affirmative actions to preserve segregation in the Yonkers schools . . . " (75a), and "there is no evidence of any affirmative pro-segregative action on the part of the State" (98a). While the court did find that the State had become "increasingly passive and reactive" (99a), it also found that the State's

> "permissiveness . . . [is] not automatically tantamount to state encouragement and/or authorization of segregation. That anti-desegregation groups in Yonkers tried to find in the State's permissiveness signs of actual, positive support for their position says something about the

> political forces at work in Yonkers; but it does not without more transform the State's failure to intervene in Yonkers into affirmative support of school segregation . . . " (99a; citations omitted).

In the section of its opinion on the effect on Yonkers of the State's "failure to intervene" (80a), what the district court did hold was that the perceived retrenchment in the efforts of state officials to combat segregation—what the court labeled the state officials' "wait-and-see" approach (75a)—"altered the balance of power between the forces in Yonkers favoring reform and the forces in Yonkers opposing reform" (80a). As the court itself recognized, this was a "subtle" effect of the state officials' perceived hands-off attitude (80a). Since the district court did not view the State's actions as tantamount to affirmative encouragement of segregation, it was a mistake for the Second Circuit to so characterize the district court's opinion.

Two occurrences apparently viewed by the Second Circuit as supportive of segregation, the passage of Chapter 342 of the Laws of 1969[1] and the elimination of the Racial Balance Fund in 1971, were acts of the Legislature, not the petitioner state officials.[2] Chapter 342 was invalidated one year after its enactment in *Lee v. Nyquist,* 318 F. Supp. 710 (W.D.N.Y. 1970) (three-judge court), *aff'd,* 402 U.S. 935 (1971), and it was never enforced against any school district in the State. In response to an inquiry from the State Education Department to all school districts when the Racial Balance Fund was eliminated, the

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[1]Chapter 342 was essentially an anti-busing law. Ironically, as we show in our petition, so was the federal Equal Educational Opportunities Act.

[2]The district court viewed these legislative actions as putting pressure on state officials to curtail their desegregation activities (79a), not as state complicity in local segregation.

Yonkers Board advised that elimination of the fund would have no impact on any then current or planned racial balance programs (Trial Ex. S at p. PE00010129). Thus, neither of those legislative initiatives could have been causally related to the segregation there. This is underscored by the 1985 findings of the district court in *Yonkers I* that the segregation in Yonkers was entirely a product of local action.

With respect to the firing of Commissioner Nyquist by the Regents, while the district court found that his aggressively activist stance on integration was a "substantial factor," the court also concluded that "Nyquist's dealings with some Regents was high-handed and offensive and that, to a considerable extent, he precipitated his own removal. In all, we find that the plaintiffs have not proven that Nyquist would not have been fired but for his views on integration" (78a). Again, there is no basis set forth in either of the opinions below for concluding that Nyquist's firing had a direct impact on the segregation in Yonkers.

Respondents do not and cannot dispute that no state policy existed as the moving force behind the creation and maintenance of a segregated school system by the Yonkers Board and the City of Yonkers. Instead, the Yonkers Board argues (Bd. Br. at 11-14), without reference to *Board of Educ., Levittown UFSD v. Nyquist*, 57 N.Y.2d 27, 43 N.E.2d 359 (1982), *app. dsmd., Board of Educ. v. Nyquist*, 459 U.S. 1139 (1983), that state policy imposed on petitioners a duty to undo what the Board and City had done, and that petitioners' failure to satisfy that state law duty justified the Second Circuit's imposition of constitutional liability. This argument runs counter to established precedent of this Court.

A violation of state law neither implicates a cognizable federal interest, nor justifies the imposition of federal constitutional liability upon a State. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 124-125 (1984) (reversing an injunction against state officials based on a state statute). Not only would the grant of relief on such a claim fail to "vindicate the supreme authority of federal law," but "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. at 106. The imposition of liability under 42 U.S.C. § 1983 depends not on violation of a duty imposed by state law but on the violation of a duty imposed by the Constitution or federal statute. Thus, any claim that state officials failed to fulfill a duty under state law to address the segregation in Yonkers is indistinguishable from the claim based on state law in *Pennhurst*, and simply cannot serve as the basis for the relief granted by the Second Circuit.

The Yonkers Board contends (Bd. Br. at 14-16) that even if petitioners did not have the duty to undo the unlawful actions of the Board and City, they could still be held liable if they failed to exercise their discretionary authority for "illegitimate reasons." However, a finding that petitioners "were capitulating to political pressures they knew were racially motivated" (32a), even if true, is not sufficient to serve as an independent foundation for liability under existing § 1983 precedent. This is especially so where, as here, the district court expressly found that the state officials neither "conspired to thwart" the implementation of the State's desegregation policy, nor approved or

supported the unlawful actions taken by the Yonkers Board and the City in violation of that policy (98a).[3]

POINT II

THE SECOND CIRCUIT'S RULINGS WITH RESPECT TO THE EEOA ARE INDEPENDENTLY WORTHY OF REVIEW

Respondents have failed to address in any meaningful respect petitioners' arguments regarding the Second Circuit's statutory holdings. The NAACP's retreat from the issue, through its claim that it is unnecessary to deal with the EEOA because "section 1983 provides an independent basis for liability against petitioners . . . " (NAACP Br. at 5), ignores several aspects of the Second Circuit's statutory rulings. First, the Second Circuit held

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[3] It is appropriate here to address a representation by the Board (footnote 2 of its brief), which is contradicted by the record in this case. The district court's decision to hold in abeyance the motion to join the petitioners was made due to the fact that, at the argument on the motion, counsel for the Board informed the court that joinder of the petitioners was sought because the Board wanted additional state funds to implement additional desegregation-related programs, but could not inform the court of any request for state funding which had been made and denied (Rec. Doc. 787, pp. 3-26). At the same argument, counsel for the State informed the court that the State was already completely financing the operating costs imposed by the desegregation order, and was unaware of any desegregation-related funding requests made by Yonkers which had been denied (Rec. Doc. 787, pp. 42-45). The court stated that, absent a denial by the State for funding, there would be no case or controversy in regard to the Board's cross-claim, and on this basis, it held the joinder motion in abeyance pending a demand by the Board for additional funds and a denial of that demand by the State (Rec. Doc. 787, p. 46).

that the State of New York and the institutional defendants are appropriate defendants under the EEOA, despite these entities' unquestioned 11th Amendment immunity from claims made under § 1983. Second, if, as the Second Circuit has held, the State has no immunity under the EEOA, the remedies available against the State under the statute could well exceed those available against state officials under § 1983. Third, the Second Circuit opined that the State could be held vicariously liable for the local acts of *de jure* segregation, regardless of the State's own actions or inaction—a broad expansion of liability under the EEOA beyond what is provided by § 1983.

The Second Circuit's EEOA holdings are legally incorrect for the reasons stated in our petition for a writ of certiorari. If the court's erroneous interpretation is allowed to stand, it could cause serious mischief in New York and elsewhere, regardless of the ultimate disposition of the § 1983 claim in this case. Certiorari is respectfully requested on this additional ground.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: Albany, New York
June 10, 1997

Respectfully submitted,

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